



January 29, 2001

Mr. Wiley B. McAfee
Police Legal Advisor
City of Irving
P.O. Box 152288
Irving, Texas 75015-2288

OR2001-0330

Dear Mr. McAfee:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 143663.

The Irving Police Department (the "department") received a request for "any and all documents relating to the investigation into the shooting of Juan Fernandez in September." You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code, in conjunction with section 143.089 of the Local Government Code, as well as under section 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 encompasses information protected by other statutes such as section 143.089(g) of the Local Government Code. Section 143.089 contemplates two different types of personnel files, one that the civil service director or the director's designee is required to maintain as part of the police officer's civil service file (the "(a)" file), and one that the city's police department may maintain for its own internal use. Local Gov't Code § 143.089(a), (g).¹

Section 143.089(g) reads as follows:

¹You state that the City of Irving has adopted Chapter 143 of the Local Government Code. We thus understand that the City of Irving is a civil service city.

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director [of the civil-service commission] or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

Subsection (g) authorizes city police and fire departments to maintain for their own use a file on a police officer or fire fighter that is separate from the file maintained by the city civil service commission. "The department may not release any information contained in the department file to any agency or person," but instead "the department shall refer to the director [of the civil-service commission] or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file." Local Gov't Code § 143.089(g); see *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 952 (Tex. App.--Austin, 1993, writ denied). The court in *City of San Antonio* addressed the availability of information that is contained in a police or fire department's internal file pursuant to section 143.089(g), and ruled that section 143.089(g) makes confidential any records kept in such an internal file. See also *City of San Antonio vs. San Antonio Express News*, 2000 WL 1918877 (Tex. App. - San Antonio Dec. 20, 2000, no pet. H.) (No. 04-99-00848-CV) (information in department file pursuant to section 143.089(g) that is not reasonably related to individual's employment relationship remains subject to disclosure under Public Information Act).

You inform this office that the records you have submitted for our review as Exhibit C are maintained as part of the personnel files of the officers involved in the shooting, and as an internal affairs file. You state these internal affairs records "are part of an officer's departmental file and, as such are confidential" under section 143.089(g) of the Local Government Code. You further assert that the information in Exhibit D "includes further records maintained for personnel matters. Therefore, these are records maintained by the Police Department under 143.089(g) and are confidential." On this basis, and upon review of the records contained within Exhibits C and D, we conclude that, to the extent this information is contained only within the internal section 143.089(g) file, the information in Exhibits C and D is confidential under section 143.089(g) of the Local Government Code, and therefore this information is excepted from disclosure under section 552.101 of the Government Code.

However, we note you also assert that "[t]he file, Exhibit C, concerning the shooting of Juan Fernandez is retained for internal purposes only relating to the investigation of narcotics trafficking by Fernandez." This statement implies that the records in Exhibit C exist outside the 143.089(g) file. Records which also exist outside of the 143.089(g) file are not

confidential under section 143.089(g). *See City of San Antonio vs. San Antonio Express News*. For any such records, we therefore next address your argument under section 552.108. Section 552.108, the “law enforcement exception,” provides:

(a) [i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of 552.021 if: (1) release of the information would interfere with the detection, investigation or prosecution of crime; (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or (3) it is information that: (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [public disclosure] if: (1) release of the internal record or notation would interfere with law enforcement or prosecution; (2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or (3) the internal record or notation: (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(c) This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. You state that “there was no prosecution of anyone as a result of this incident.” We thus understand you to assert that the requested information pertains to a case that concluded in a result other than conviction or deferred adjudication. Therefore, we conclude that any information not covered by section 143.089(g), is excepted from disclosure under section 552.108(a)(2), with the following exception.

We note that “basic information about an arrested person, an arrest, or a crime” is not excepted from required public disclosure. Gov’t Code § 552.108(c). Basic information is the type of information that is considered to be front page offense report information even

if this information is not actually located on the front page of the offense report. *See generally Houston Chronicle Publ'g Co., supra*; Open Records Decision No. 127 (1976). Thus, you must release basic information from the documents excepted under section 552.108(a)(2).

In addition, Exhibit C contains a custodial death report. In Open Records Decision No. 521 at 5 (1989), this office concluded that under article 49.18(b) of the Code of Criminal Procedure, in conjunction with a directive issued by the Office of the Attorney General, section one of a custodial death report filed with this office is public information, but sections two through five of the report, as well as attachments to the report, are confidential. *See* Code Crim. Proc. art. 49.18(b) (attorney general shall make report, with exception of any portion of report that attorney general determines is privileged, available to any interested person). Thus, section one of the custodial death report is not confidential under section 143.089, nor is it excepted from disclosure under section 552.108. The department must release section one of the custodial death report to the requestor. However, because sections two through five of the report and attachments thereto are deemed confidential under article 49.18(b), the department must not release the remaining portions of the custodial death report.

Also included in Exhibit C is an autopsy report. Section 11 of article 49.25 of the Code of Criminal Procedure provides as follows:

The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate. . . . The records are subject to required public disclosure in accordance with Chapter 552, Government Code, except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with Chapter 552, Government Code, but is subject to disclosure:

- (1) under a subpoena or authority of other law; or
- (2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Code Crim. Proc. art. 49.25, § 11. Pursuant to section 11, the autopsy report is a public record and is not confidential under section 143.089, nor is it excepted from disclosure under section 552.108, and thus it must be released to the requestor. We have marked this document with a green tag.

To summarize, the information in Exhibits C and D must be withheld under section 143.089(g) of the Local Government Code, in conjunction with section 552.101 of

the Government Code. With regard to Exhibit C, however, if this information exists outside of the 143.089(g) file, it is not confidential under section 143.089(g), but it is excepted from disclosure under section 552.108(a)(2), with the exception of basic information. Section one of the submitted custodial death report, as well as the submitted autopsy report, are public and must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Michael A. Pearle".

Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 143663

Encl. Submitted documents

cc: Ms. Jennifer Emily
Staff Writer
The Dallas Morning News
P.O. Box 655237
Dallas, Texas 75265
(w/o enclosures)